

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**TAMMI WHEELER**

Claimant

VS.

**SHAY PRODUCTIONS**

**PREFERRED SIDING & IMPROVEMENTS**

Respondents

AND

**UNKNOWN**

**AMERICAN FAMILY MUTUAL INSURANCE CO.**

Insurance Carriers

Docket No. 247,943

**ORDER**

Claimant appeals from a preliminary hearing Order entered by Administrative Law Judge Jon L. Frobish on December 3, 1999. Judge Frobish found that as to respondent Preferred Siding, claimant was an independent contractor.

**ISSUES**

Claimant states that the only issue on appeal is whether claimant was an employee or independent contractor of respondent Preferred Siding.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record and considering the argument, the Appeals Board concludes the Order should be affirmed.

Claimant seeks preliminary benefits for carpal tunnel syndrome she claims she developed from the work activities she performed as a telemarketer. Claimant, who has done telemarketing for approximately 15 years, did telemarketing for two companies at the time of her alleged injury, Shay Productions and Preferred Siding. The Order by the ALJ considers claimant to be an employee of Shay Productions but an independent contractor for Preferred Siding.

Shay Productions is a telemarketing company with offices in Wichita, Kansas. Claimant worked at those offices and there was provided a telephone, desk, phone books, call sheets, and the presentation to be given. Shay Productions paid claimant \$7 per hour

plus commissions. The ALJ's finding that claimant was an employee of Shay Productions is not at issue in this appeal.

Preferred Siding sells siding as well as other home improvements and additions. Preferred Siding is located in Dodge City, Kansas. Claimant did telemarketing for Preferred Siding out of her home in Wichita. Preferred Siding gave claimant training on some of its products and gave claimant an outline of a presentation. For Preferred Siding claimant generally worked, at the time of the injury, 32 hours per week, but claimant determined her own hours. Claimant was to set appointments for Preferred Siding sales personnel and was given a goal for the number of appointments she might set. Claimant provided her own telephone but Preferred Siding paid the phone bill. Preferred Siding paid claimant \$400 per week plus commissions.

Although other factors may also be relevant, the right to control remains the most important indicator of an employment relationship. *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976). In this case, Preferred Siding did not, in our view, have the type of control most commonly associated with employment. Claimant set her own hours. Claimant determined the specifics of her presentation. Respondent set goals but claimant controlled, to a large extent, what she did to reach those goals. Other indicia of an independent contractor status include the fact claimant worked out of her own home, the fact that respondent did not withhold taxes from claimant's pay, and the fact that telemarketing was not respondent's primary business. While there were other factors which might be consistent with an employer-employee relationship, the Board concludes the balance of the factors tip in favor of the conclusion claimant's relationship to respondent was that of an independent contractor.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order entered by Administrative Law Judge Jon L. Frobish on December 3, 1999, should be, and the same is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of February 2000.

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BOARD MEMBER

c: Stephen J. Jones, Wichita, KS  
William L. Townsley, III, Wichita, KS  
Ray Kangro, Kansas City, MO  
Jon L. Frobish, Administrative Law Judge  
Philip S. Harness, Director